

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROGER DALE CLARK,
Petitioner.

No. 2 CA-CR 2015-0129-PR
Filed August 4, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pinal County

No. S1100CR200601309

The Honorable Henry G. Gooday Jr., Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Renee J. Waters, Deputy County Attorney, Florence
Counsel for Respondent

Roger Dale Clark, Florence
In Propria Persona

STATE v. CLARK
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Petitioner Roger Clark seeks review of the trial court’s order summarily dismissing his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Clark was convicted after a jury trial of two counts of child molestation and three counts of sexual conduct with a minor. The trial court sentenced him to consecutive and concurrent presumptive prison terms totaling seventy-seven years. We affirmed Clark’s convictions and sentences on appeal, *State v. Clark*, No. 2 CA-CR 2007-0135 (memorandum decision filed Aug. 14, 2008), and denied relief on his petition for review from the court’s denial of his first petition for post-conviction relief following two evidentiary hearings, *State v. Clark*, No. 2 CA-CR 2010-0201-PR (memorandum decision filed Sept. 16, 2010).

¶3 In July 2013, Clark initiated his second post-conviction proceeding by filing a “Notice of and Petition for Rule 32” relief, and appointed counsel filed a notice of completion stating he would not be supplementing or amending the Rule 32 petition Clark previously had filed and requested an extension of time to permit Clark to file a pro se petition or amend the previously filed petition. In December 2014, Clark filed a “supplement” to the Rule 32 petition he had filed in July 2013, attaching his previously filed petition to that pleading.

¶4 In his Rule 32 petition, Clark essentially restated Rules 32.1(e), (f), and (h), asserting generally and without further

STATE v. CLARK
Decision of the Court

explanation, he was entitled to relief based on newly discovered evidence; his failure to file an untimely notice of post-conviction relief or notice of appeal was through no fault of his own; and, clear and convincing evidence exists that would establish he is innocent. He also asserted his constitutional rights had been violated based on Rule 32.1(a). Additionally, Clark raised claims based on prosecutorial misconduct and ineffective assistance of trial, appellate, and Rule 32 counsel. In the supplement to his Rule 32 petition, Clark argued his current Rule 32 counsel had been ineffective. Noting it had reviewed Clark's supplement to the petition for post-conviction relief and the state's response thereto, and that it had considered "the arguments presented," the trial court found Clark had "failed to show any colorable claims" and dismissed his petition. This petition for review followed.

¶5 On review, Clark argues the trial court erred in summarily dismissing his claims, apparently asserting the brevity of the court's ruling suggests it did not consider all of his arguments, and maintains he is entitled to an evidentiary hearing. To the extent the numerous issues Clark presents for review include new claims raised for the first time on review, we do not address them.¹ See Ariz. R. Crim. P. 32.9(c)(1)(ii); see also *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider issues raised for first time on review).

¶6 Clark's remaining claims of ineffective assistance of trial and appellate counsel are precluded. Generally, a defendant must raise claims of ineffective assistance of counsel, if at all, in his or her initial Rule 32 proceeding. *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) ("Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a [previous] Rule 32 post-conviction relief proceeding, subsequent claims of

¹The claims Clark appears to raise for the first time on review include the following: there were violations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963); his petition was untimely because of "extraordinary circumstances"; the "prosecutor became a judge, and sat on this present case"; and, there was a significant change in the law that would have affected the outcome of his case.

STATE v. CLARK
Decision of the Court

ineffective assistance will be deemed waived and precluded.”) (emphasis omitted); *see also Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d at 952 (same). Thus, because Clark in fact did raise claims of ineffective assistance of trial counsel in his first Rule 32 petition, and could have raised claims of ineffective assistance of appellate counsel in that same petition, the trial court correctly dismissed those claims. Additionally, as a non-pleading defendant, Clark is not constitutionally entitled to the effective assistance of Rule 32 counsel, and the court therefore correctly dismissed that claim as well. *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011); *see also State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013) (non-pleading defendants “have no constitutional right to counsel in post-conviction proceedings” and claim of ineffective assistance of Rule 32 counsel is not cognizable for such defendants).

¶7 In addition, several of Clark’s other claims are precluded because he could have raised them on appeal.² *See* Ariz. R. Crim. P. 32.2(a). To the extent Clark obliquely argues certain claims are excepted from preclusion under Rule 32.2(b) because they are based on newly discovered evidence, Rule 32.1(e), or actual innocence, Rule 32.1(h), Clark does not present any argument explaining why he is entitled to relief on those grounds. Finally, to the extent Clark also asserts his petition was filed untimely through no fault of his own, Rule 32.1(f), based on its clear language, this rule is not available to non-pleading defendants like Clark who already have had an appeal.

¶8 For all of these reasons, review is granted but relief is denied.

² For example, Clark could have raised the claim of prosecutorial misconduct on appeal, including his assertion that he was entitled to copies of the opening and closing arguments to support this claim, and his claim that his constitutional rights were violated.